



ALBA | CHRUTHACHAIL

Convener of the Constitution, Europe, External Affairs and Culture Committee  
Clare Adamson MSP  
The Scottish Parliament  
Edinburgh  
EH99 1SP

30 August 2024

Dear Convenor

Regarding the funding previously provided to Rein, I confirmed to the Committee that Creative Scotland would carry out a review of this award and that, once this was complete, we would share a copy of the review report with you.

I can confirm that this review is now complete and I attach a copy of the report for the Committee's information. The review sets out the background and timelines of the Rein project, an analysis of the circumstances surrounding the breaches of contract and withdrawal of funding, and the review's findings, recommendations and actions as a result.

I trust this addresses the Committee's interest in the review but please let me know if anything requires clarification.

Yours sincerely

Iain Munro  
Chief Executive



**Report Title:** Review of the REIN Open Fund Individuals Award

**Concluded:** 23<sup>rd</sup> August 2024

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## Executive Summary

In March 2024, Creative Scotland was faced with a significant issue arising from a funding award made through the Open Fund for Individuals.

This issue was in relation to a project entitled "REIN" which, following an eligible application to the Open Fund for Individuals and following the process of assessment against the published criteria, was awarded funding.

When the project was to commence, the project advertised for performers to take part in the work. The advert demonstrated a significant change to the project for which Creative Scotland had agreed to provide funding. Subsequently, and after investigation, Creative Scotland withdrew the funding on the basis of breach of contract.

Creative Scotland understood that the "REIN" project would contain strong sexual themes when assessing the application for funding. However, funding was awarded on the basis that this was a theatrical performance, including all scenes with sexual content.

On announcing the project and advertising for performers, the project departed from the approved application and advertised for performers to embark on real sex acts.

Creative Scotland would not have awarded any funding had this information regarding real sex acts been expressly referenced in the application.

Changing the scope of a project and publicising a project without approvals from Creative Scotland constitute breaches of contract.

This departure in scope from a purely theatrical performance was published on the project's website in the description when the project was advertising for performers. This resulted in immediate significant media, political and public attention.

As detailed below, following a prompt review, Creative Scotland concluded breaches of contract had occurred and terminated the funding agreement with the artist and agreed that the artist would repay a defined amount of the grant paid to the artist up to that point in time, taking into account certain sums that had already been expended by the artist on payments to third parties in respect of the project. The agreed amount of grant was duly repaid to CS.

This Review concludes that the application, award, and subsequent funding withdrawal were made in line with due process, policies and the applicable terms of the legal contract between CS and the grant recipient.

However, the content of the approved application was considered controversial and significant issue has been taken with an award being made to such a project.

What is clear is that the initial controversy arose due to the extreme nature of the advert placed by the artist.

Creative Scotland handles large numbers of grant applications each year, for example, in 23/24 over 4,000 applications were received and more than 1,500 grants were awarded. These grants support the development, work, and projects of a wide range and diversity of artists and organisations, making art and creative work for the benefit of people living in and visiting Scotland. This single award ought to be considered against the wider context of the many awards made successfully and without controversy through Creative Scotland's processes, policies and funding decisions each year. One controversial award does not represent a systemic problem with Creative Scotland's processes.

However, through this review, Creative Scotland has identified areas where additional review and risk assessment and mechanisms for escalation prior to agreeing an award would further strengthen existing processes. Lessons have been learned from this and associated actions are already being put into place. These are detailed below.

This review has been through the relevant Creative Scotland governance processes; the findings and associated recommendations have been agreed by the Board of Creative Scotland. The Creative Scotland Senior Leadership Team will continue to proceed with implementation of the recommendations of this review and will report on progress to the Board via the Creative Scotland governance arrangements.

It is noted that the CEO, Chair and Board of Creative Scotland have been engaged with the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament on the subject of this award and a list of correspondence and weblinks has been included at Annex A.

## Scope and methodology of this report

### **Reviewer**

In line with its established practice, Creative Scotland appointed a member of the Senior Leadership Team "the Reviewer" to carry out this internal review. The Reviewer had no prior involvement with the award in question.

### **Scope**

This Review records the findings of an investigation into the funded project "REIN". It considers whether process and policy were followed in the award of this funding and the position that Creative Scotland took on the matter. It identifies associated lessons and sets out suggested actions.

The Review deals with the facts in chronological order as far as possible. It sets out the investigation undertaken, the position arrived at by Creative Scotland and continues to capture the lessons learned and actions required going forward.

In order to be comprehensive, Creative Scotland took the initiative to widen the scope of this Review and a final section has been added to look beyond the

immediate learnings of the project review, with a view to identifying areas where additional risk management, and internal and external factors will, in future, assist in early identification of projects that are or have the potential to include controversial content and effective identification and management of any associated risks.

This review records that a number of actions have already been taken as a result, including introduction of immediate additional controls while medium and longer-term policy, process and governance improvements are agreed and implemented.

### **Methodology**

This was an internal investigation, carried out by a reviewer who is independent of the award decision.

The review included the following:

- Review of documentation, including application materials, correspondence and policies and processes
- Access to staff members including the assessor and panel chair
- Access to legal advisers, internal and external
- Preparation of this report.

### **Report structure**

This report is split into two parts:

- Section 1 contains the detailed review of the award
- Section 2 contains information on the lessons learned and actions resulting from this.

# Section 1: Review of the Award

## 1. Background/Context

### 1.1 Creative Scotland

Creative Scotland is the independent public body that supports the arts, screen and creative industries across Scotland through strategic development, funding and advocacy.

Creative Scotland distributes funding for the arts, screen and creative industries from two primary sources - the Scottish Government and the National Lottery. It is an arms-length body and works independently of the Scottish Government and The National Lottery in decisions regarding Funding/Grant Awards.

Across Scotland, Creative Scotland's work spans support for cultural organisations as well as the development of individual artists by funding new work, ideas and projects, and delivers specific activity with partners, including other funding bodies.

Specifically, Creative Scotland's purpose under Part 4 of the Public Services Reform (Scotland) Act 2010 describes the general functions of Creative Scotland as:

1. Identifying, supporting and developing quality and excellence in the arts and culture from those engaged in artistic and other creative endeavours
2. Promoting understanding, appreciation and enjoyment of the arts and culture
3. Encouraging as many people as possible to access and participate in the arts and culture
4. Realising, as far as reasonably practicable to do so, the value and benefits (in particular, the national and international value and benefits) of the arts and culture
5. Encouraging and supporting artistic and other creative endeavours which contribute to an understanding of Scotland's national culture in its broad sense as a way of life
6. Promoting and supporting industries and other commercial activity, the primary focus of which is the application of creative skills.

To facilitate this, Creative Scotland's funding/grant awards can be accessed by application through a number of distinct funds covering organisations and individuals. The focus of this report is an award under the Open Fund for Individuals.

## 1.2 The Open Fund - Overview

There are two **open access funds** run by Creative Scotland:

- **Open Fund for Organisations**
- **Open Fund for Individuals**

This report concerns an award made under the Open Fund for Individuals.

### **The Open Funds for Individuals - Process**

This fund allows individual artists to apply for funding to support a range of different types of activity, including personal development i.e. attending residencies and training in new artistic practices, or funding for creative projects and performances such as theatre, dance or exhibitions. Artists may apply to use the funds to employ or otherwise contract with others as part of the delivery of the work and this is typically indicated in the application.

There is a very wide range of types of work and levels of funding requested via this fund which has a current minimum threshold of £500 for funding requests and an upper limit of £100,000. An application to the Open Access Fund for Individuals can be made at any time during the year and it is not deadline based, as some other funds are. These thresholds are fixed at the discretion of Creative Scotland.

An application is made and must include a written description of the project and a series of supporting documents including, for example, a budget, risk assessment etc.

A Funding Team check all the relevant documents are completed before it is progressed to assessment.

Once eligibility checks are complete, applications are initially assessed by a single Assessor, with an oversight Quality Assurance check from a Specialism Lead or Manager. The assessment determines if the application and the full submission meets the fund criteria. It is then designated as "fundable" or "not fundable".

Applications and their associated assessments are then batched and allocated to Funding Panels for further review and the actual decision as to whether they will be funded.

The Panel then review those fundable applications and decide which applications will be funded from that specific panel budget. The Panel bases this on comparative analysis which considers which of the applications best meet the fund criteria.

In the event they are unsuccessful, applicants can submit a second or "reapplication" for the same piece of work. However, applicants cannot reapply a third time.

From receipt of any application to the Open Fund for Individuals, Creative Scotland aims to complete the process of decision for funding in 8 to 12 weeks, depending on the level of funding requested.



### 1.3 Open Fund for Individuals – Demand

The Open Fund for Individuals has an allocated budget of circa £5m to £6m per year. However, demand for this fund has increased dramatically since 2019.

- The value requested from individuals has seen a 211% rise from £6.8m in 2018/19 to £21.2m in 2023/24.
- In terms of volume, applications have increased from 552 in 2018/19 to 1,395 in 2023/24, representing an increase of 153%.

This is therefore a highly competitive fund; panels often have difficult decisions to take, and they engage in extensive deliberations and discussion before arriving at their final funded project list against the limited budget available.

The fund has a success rate for fundable applications of between 25% and 30%. This means, typically, of the applications assessed as “fundable”, between 70% and 75% of these are not actually awarded funding.

## 2. Award to the “REIN” Project

This section of the review considers the assessment that took place in relation to the successful “REIN” funding award.

To understand what had taken place up to the point of the artists publication of their call for performers, three key areas were reviewed:

- Understanding the contractual terms applicable to this funding agreement.
- Whether the assessment process in place for Open Fund for Individuals Awards was followed correctly.
- The documentation relating to the application and award of the funding.

### 2.1 Award background and timeline

In October 2023, an application was made to Creative Scotland’s Open Fund for Individuals by Leonie Gasson (“the Artist”) for a project entitled “REIN”.

At the time, the project is described by the Creative Scotland Assessor as follows:

*“This is an application that seeks support to develop a new large-scale sustainable and internationally touring multi-artform show that will be a filmed performance with a cast of nine, with the intention of creating an immersive space and experience for audiences interested in queer led performance”.*

*“As the artist describes, it “sits in a theatre context’ and includes “dance, digital arts and visual arts” which gives it wider appeal.” It is an ambitious project with a team who are both early and early mid-career, and CVs point to established track records and projects within their combined portfolio. At its heart the project is care and access focused, and diverse led”.*

*"In terms of the creative narrative and vision, the work is described as using "no spoken language, involving movement choreography and sex choreography in the performance".*

Following due process, an Open Fund for Individuals Panel was convened to assess the REIN application (as well as other unrelated applications).

In line with the relevant process, the Panel was made up of three Panel Members plus the Panel Chair.

The Panel Chair was a Creative Scotland Director with extensive experience of assessing, panel participation and panel chairing. The Panel Members all had substantial prior experience of panel participation. This was therefore an experienced panel, overseen by an experienced and senior Chair and the panel composition complied with process of panel composition.

### **January 2024**

Creative Scotland, having completed all parts of the process fairly and in accordance with proper due process, an Open Fund for Individuals award was made to the Artist, for the "REIN" project. The grant awarded was £84,555. The first payment of £76,100 was made in January, with the remaining amount withheld as is usual Creative Scotland practice. This final tranche of money is issued on receipt of a fully complete final project report or End of Project Monitoring Form.

### **Sunday 25<sup>th</sup> February 2024**

On Sunday 25<sup>th</sup> February, the artist issued a project announcement on their website and called for performers to audition to take part.

This was linked to a posting on the Creative Scotland "Opportunities" site. This is a site where individuals and organisations can post information about projects and also put out a call for performers they wish to engage for their creative work.

Any creative/artist for any project in the creative industries can post on the Opportunities site - the project does not have to be a Creative Scotland funded project to be posted.

Secondly, partly because of the "open access" nature of the Opportunities site and due to potential employment opportunities available via the site, it is the most visited page on the Creative Scotland website.

In this case, the "REIN" post on the Opportunities site, and all other social media including the artist's own website, was the same and made reference to Creative Scotland as a funder.

The call for performers was also posted widely on the Artist's social media channels.

The Artist's post was explicit in nature and included reference to "non simulated sex" i.e. a real sex act being part of the performance.

### **Friday 8<sup>th</sup> March 2024**

Late on the evening of Friday 8<sup>th</sup> March, Creative Scotland began to receive media enquiries from journalists, and social media enquiries from members of the public, who had picked up on the Artist's call for performers. These enquiries questioned whether the funding provided to the Artist was an appropriate use of public funds.

Creative Scotland was not aware of the nature of this post until it was brought to their attention by these enquiries; see page 13 for further details.

### **Saturday 9<sup>th</sup> and Sunday 10<sup>th</sup> March 2024**

Creative Scotland acted immediately. As the issue emerged, Creative Scotland's CEO undertook an assessment to gather the facts of the case.

In the CEO's view, the facts that came to light at that time were clear, that the application had been received and the award had been made fairly and by due process and based on the information provided by the Artists in the application.

However, the post advertising for performers appeared to be contrary to what had been presented in the application and as such, the Artist was potentially in breach of the contract that regulated their award. Creative Scotland took the view that the potential breach of contract required further investigation.

On Sunday 10<sup>th</sup> of March, to enable further investigation, and being mindful of the duty of care to the Artist, the project team and Creative Scotland's employees, a holding statement was issued:

*"We support freedom of expression and artists being able to push the boundaries of radical performance.*

*However, the project, REIN, is considerably more explicit in its execution than was indicated in the application received to our Open Fund.*

*As such, we are reviewing this award and will be discussing next steps with the applicant and with the other partners in the project."*

### **Monday 11<sup>th</sup> – Wednesday 13<sup>th</sup> March 2024**

On Monday 11<sup>th</sup> a Director had a meeting with members of the REIN project team.

In the meantime, the CEO and members of the Executive team continued to meet and undertook an in-depth review of the assessment process to understand more fully the factors in making the funding award and the contractual position. Creative Scotland's independent legal advisers were engaged to provide advice on the Artist's contractual obligations under the grant funding terms and conditions.

Significant effort was made to act as swiftly as possible, while maintaining a comprehensive and fair assessment of the facts.

### **Wednesday 13<sup>th</sup> March 2024**

The CEO and members of the Creative Scotland Executive held a meeting with the Artist and members of the Rein project team to inform them of the intention to withdraw funding as a result of their breaches of contract.

### **Thursday 14<sup>th</sup> March 2024**

A statement was published by Creative Scotland as follows:

*"Following a review of the application, assessment, and contractual agreement regarding the project Rein, Creative Scotland has made the decision to withdraw support for this project and will be seeking recovery of funding paid in respect of this award to date.*

*What has emerged in the latest phase of the project represents a breach of the conditions of funding award, as the nature of the project has changed. The central role that 'non-simulated' (i.e. real) sex acts now play in the project, marks a significant change to the nature of the work presented in the original application which was assessed for funding. This significant change to the nature of the work has been evidenced in the most recent announcement on the project's website, without the agreement of Creative Scotland.*

*Creative Scotland makes in the region of 2,000 funding awards each year. We support artists and projects across all art-forms, some of which are challenging in content, and push creative and social boundaries.*

*However, Creative Scotland has important responsibilities to the public for the appropriate use of public funding, and, as recipients of that public funding, award recipients also have legal responsibilities as reflected in their funding contract."*

## **2.2 Contractual Terms**

The process for making awards under the Open Fund for Individuals is very well-established. This review confirmed that the relevant processes were adhered to including the stages relating to eligibility, allocation of Assessor and Panel, assessment process, panel process, award and contracting.

The standard terms and conditions of grant funding for Creative Scotland contracts are published on the Creative Scotland website. The review undertaken by the CEO and Executive Team confirmed that the award was subject to Creative Scotland's standard contractual documentation, including the standard terms and conditions of contract. It was established that this included the terms and conditions relating to changes to the funded work, notifications relating to publicity and communications, and termination provisions.

## **2.3 Review of the Documentation**

The documentation associated with the award that was reviewed included:

- The application and all supporting documents submitted by the Artist relating to the "REIN" award.
- Review of the Panel and Application assessment

- Review of the Artist's call for performers, including the post on Creative Scotland "Opportunities" page on the website
- Review of End of Project Monitoring form relating to an earlier award

### 2.3.1 Review of Application and Materials Submitted for the "REIN" Award

All application and supporting documents submitted by the artist relating specifically to the "REIN" award were reviewed as part of this review exercise. It was clear that the application had been reviewed in accordance with Creative Scotland's standard procedures. All policy and processes were followed.

In the Reviewer's opinion the issue with the REIN application was not the procedures and processes that resulted in funding being awarded to the Artist. Rather, it was a change in scope of project, as demonstrated by the call for performers. As well as representing a change of scope, the call for performers also brought the project and its publicly-funded status into public focus.

However, Creative Scotland did not award funding on the basis of the information contained in the call for performers and does not condone what the artist called for from performers, as detailed below.

The application from the artist referred to 'simulated sex acts' i.e. choreographed performance and did not at any stage include any express reference to "non-simulated" or real sex acts/performance.

Throughout the entire application, the materials referred to the work as a "performance".

The application included a description of the planned piece of work, and it was clear that there would be elements of a sexual nature.

It discussed how risks associated with this and care for the performers would be managed including use of Intimacy Co-ordinators.

The supporting documents did not contain any express reference to "non-simulated sex" acts, that is, real sex acts. The application included a number of CVs for roles on the project and risk assessment, an access and care rider template and intimacy rider information. This information is consistent with what would be expected for performances that include simulated/choreographed sex scenes.

The application referenced a number of specialist roles and safeguards as part of the project, for example, the use of Intimacy Co-ordinators. This is expected practice in projects that involve sexual content in their performance and is consistent with what would be expected for performances that include simulated/choreographed sex scenes.

In conclusion, the application materials indicated that this work would feature sexual content. However, this indication was in the context of a performance and as such it was not made clear from any of the materials reviewed that there was any intention to pay performers to participate in real sex, as opposed to a performance that would include simulated/choreographed sex scenes.

### 2.3.2 Review of the Panel and Application Assessment

Following due process, the Panel was made up of three Panel Members, plus the Panel Chair.

The Panel Chair was a Creative Scotland Director with extensive experience of assessing, panel participation and panel chairing. The Panel Members all had substantial prior experience of panel participation. There were no conflicts of interest identified for panel members. This was therefore an experienced Panel, overseen by an experienced and senior Chair and the panel composition complied with process of panel composition.

The panel were unanimously in support of the award. Based upon the written information given by the Artist, the panel involved in this decision were entitled to determine that this was comparable to other pieces of theatre/performance that, while challenging in content, were standard in execution.

In interviews undertaken during this review, the original Assessor provided detailed reflections on their view of the application, confirming unequivocally that they interpreted and assessed this as an application for a performance that would depict choreographed sexual activity, not real sex.

In conclusion, in assessment of the Panel process and its award of the funds, a reasonable person employed by Creative Scotland and charged with assessing this application for the purposes of deciding whether to award arts grant funding to the project did so in good faith based on the Artist's submission.

In addition, given the elements of good practice proposed in the application by the artist to support performers with for example Intimacy Co-ordinators, the Creative Scotland Panel members reasonably and properly understood that this application referred to choreographed performance and acting. The application did not make it clear that the work would include real sex acts.

### 2.3.3 Review of Creative Scotland "Opportunities" Site Posting Review

The Creative Scotland "Opportunities" site is a web resource that Creative Scotland provides for the benefit of those working in the Arts and Culture in Scotland. Any organisation or individual can post content on this site to advertise opportunities in the creative and arts sectors.

The site is not restricted to projects funded by Creative Scotland; any project/organisation/individual can post opportunities here. Individuals or organisations wishing to advertise an opportunity post this directly to the site, they do not submit this to Creative Scotland, it is a direct upload/post to the Opportunities website.

- The site is extremely popular, with around 5,500 posts each year (about 106 per week).
- It receives approximately 890,000 individual visits annually, resulting in nearly 3,500,000 page views.
- Users view an average of 10 pages per visit and spend about 4 minutes and 20 seconds on the site, with 1 minute and 40 seconds actively

engaging. About 30% are returning users, indicating that the content is valuable and engaging, fostering a loyal community.

- The site's content is user-generated and includes information from third-party sources. Submissions are reviewed by the Communications Directorate of Creative Scotland.

This is a high-volume resource open to all those working in the arts, culture and creative industries in Scotland and, as previously stated is not limited to projects funded by Creative Scotland.

Consequently, at the time of the REIN award, Opportunities postings were not reviewed by Creative Scotland staff in terms of the detail of the projects or detailed analysis of links to other content related to a particular project.

However, a simple check was carried out by a member of the Creative Scotland Communications team purely to ensure the post complied with Fair Work guidelines, ensuring any rates of pay proposed meet National Living Wage as a minimum.

On 25<sup>th</sup> February the Artist publicly announced a call for auditions on their own website, also posting summary information relating to the call for auditions for the "REIN" project on the Creative Scotland Opportunities site, linking this through to their own website.

Once the explicit nature of the content linked to on the project's website was appreciated, the call for performers on the Opportunities site was removed by Creative Scotland; however, screen shots were taken to provide proof of content.

It is concluded that:

- The artist did not share their web content with Creative Scotland in advance of publication, which is a contractual obligation. No request was submitted to Creative Scotland in writing or verbally to approve this web content.
- A posting on the "Opportunities" site, linking to web content that is already live, does not constitute the artist securing prior written approval from Creative Scotland for its announcement, which is a point of contractual obligation dealt with elsewhere in this report.
- The 'fair work' check on the Opportunities ad took place as it should, in line with due process.

At the time of the REIN posting, Creative Scotland checks of Opportunities site postings were limited to checking Fair Work and the National Living Wage. Following this review, enhanced checks have been implemented, which are detailed in the lessons section later in this document.

#### 2.3.4 Previous Award relating to REIN

The Artist had previously been awarded a grant of £23,219 for a project that was a Research and Development phase related to REIN through the Open Fund for Individuals in August 2022. This was a separate funding award for research

and development. It is separate from the award that is the subject of this review and is therefore out of scope for this review. However, the Reviewer wished to include a note here regarding a specific document, the End of Project Monitoring Report (EOPM), relating to this earlier project.

Once any project funded by Creative Scotland is complete, an End of Project Monitoring report is submitted to Creative Scotland, this is the case for all projects. The purpose of this document is to evidence to Creative Scotland that the project has been completed in line with the conditions of the grant award.

Creative Scotland retains an amount of the award, typically 10%, which is only released upon completion of the associated project. Submission of the EOPM triggers the release of this final payment. The purpose of an EOPM is therefore to confirm and evidence that the project has been carried out in line with the award and contract.

EOPM reports are typically reviewed by the Creative Scotland member of staff that originally assessed the application for funding. They check that the EOPM report provides sufficient evidence of project completion to allow them to confirm the project was completed and release the final 10% payment.

In the case of this earlier award, the EOPM report was submitted in March 2023 and confirmed the completion of the relevant R&D work. There was some information included in the report relating to potential future work, which is not a requirement in completing an EOPM report and is not a requirement for release of the final payment.

The EOPM report included reference to research and development to "*establish the role of Intimacy Coordinator in the context of erotic work depicting non-simulated sex acts; create template documents for future productions*". In the Reviewer's assessment, the use of the word "depicting" is of critical importance in the context of research and development of a choreographed theatrical performance piece. The subsequent funded REIN application however made no reference to "non-simulated" sex.

There is no expectation or requirement that Creative Scotland, having funded a piece of Research and Development work, would fund any further work connected to that Research and Development. All new applications to the Open Fund for Individuals, including those that follow previously funded Research and Development projects, are treated as standalone and assessed solely on the application materials provided for each separate application.

Creative Scotland maintains separation between previous awards and new applications. This means that none of the material relating to a previous award, including the EOPM report is considered when assessing a new application for funding. However, the Reviewer is satisfied that, had the EOPM report formed part of the information put before the assessor as part of their assessment of the application relative to the "REIN" project, the information contained in the EOPM



report would not have altered the outcome of their assessment of the application.

In summary:

- The EOPM documentation did not form part of the decision to fund the "REIN" project in 2024.
- There is no express mention of real sex acts or the term 'non-simulated sex' in the application materials received in 2024. Creative Scotland does not consider any other material beyond the application materials in funding decisions, so there are no circumstances in which an EOPM report for a previously closed piece of funding would be considered as part of a new application assessment.

### 2.3.5 Considerations regarding the artist when responding to FoI requests

As a public body, Creative Scotland is subject to the Freedom of Information Act. This award resulted in a large number of Freedom of Information requests, 23 in total.

Legitimate concerns were identified with regard to the "REIN" project and Creative Scotland took a reasonable and swift course of action in reviewing these and having identified breaches of contract, withdrew funding.

However, once awarded, it would be unreasonable to expect that Creative Scotland would monitor awards and project delivery at a granular level and Creative Scotland is not responsible for the actions of the grant recipient and individuals involved.

All awardees, whether individuals or organisations, have important legal obligations and responsibilities in how they make use of public funds and Creative Scotland expects and makes it clear that all awardees must stay within the boundaries of their approved application.

Creative Scotland will always act with sensitivity and care where a project experiences difficulties, including where funding is withdrawn. However, awardees are responsible for all elements of their project, including all duty of care and risk management relating to themselves and those working on their projects.

Given the reaction to this project and the nature of discourse around it, there were genuine concerns regarding the impact of such discourse upon the Artist and those involved in the project, and on Creative Scotland staff.

Recognising that there could be risks to the safety and wellbeing of those involved in the project, Creative Scotland was mindful of such risks when responding to Freedom of Information requests, taking safety concerns into account when deciding which elements of information might be redacted.

Creative Scotland also shared the Freedom of Information responses with the Artist and partner organisations in advance of releasing these, so that they could prepare for any ensuing additional attention.

For clarity, by making the Artist and partner organisations aware of the Freedom of Information responses, Creative Scotland was not offering to make changes to the responses, which are governed by legislation, merely giving the Artist and their team the opportunity to be prepared.

This is useful learning for future responses and Creative Scotland will ensure this approach is adopted in future where appropriate.

### 3. Summary of findings

The comprehensive review of this case as set out in the above report, together with extensive conversations with key members of staff involved, has enabled the Reviewer to arrive at a position regarding this matter.

In summary:

- Creative Scotland received an application for the “REIN” project, and it was processed appropriately within policy and process as fully detailed in this review.
  - The application was expertly assessed and was put forward for Panel decision.
  - An experienced Panel was convened in line with policy, process and good practice
  - The Panel recommended that an award of funding could be made in good faith based on the information they were given.
- Whilst the “REIN” application was legitimately supported in the knowledge that it would be a challenging piece of performance art with a clear storytelling narrative and sexual themes, it had been carefully considered and understood to be sensitively addressing the nature of this content. Critically, and most importantly, the “REIN” project was understood to be a piece of choreographed performance. However, at no point was it expressly stated that real sexual acts i.e. 'non -simulated acts' were part of the delivery plans of the project. As such, the Panel concluded to award funds on a fair assessment basis.
- Creative Scotland has very deep concerns regarding the change to the project and would not consider anything other than a choreographed performance as appropriate for funding. Creative Scotland does not condone using its funding to pay performers to engage in non-simulated sex acts. It is not an appropriate or acceptable use of public funding and the risks around safeguarding, potential effects on vulnerable people, risks of exploitation and potential for power imbalances is unacceptable.
- Creative Scotland sought legal advice and, following this, communicated its position to the Artist, confirming that Creative Scotland would be withdrawing funding and intention to recoup the funding paid so far. The basis for this was twofold.
  - Firstly, funding recipients are required to notify and obtain the agreement of Creative Scotland prior to making any changes to the approved work for which an award has been made. The move to

include non-simulated/real sex in the work was a change and as such constituted breach of contract.

- It is noteworthy that there is provision in the contract for an artist to apply to Creative Scotland to change their application. Any changes mean the award is subject to review which, amongst several options, could include removing the award of funding. Had the "REIN" project indicated its intention to make this change, Creative Scotland would have reviewed this in line with the contract and either accepted or rejected it. No such opportunity was presented by the Artist.
  - Secondly, funding recipients are contractually required to share any planned communications regarding their project with Creative Scotland and seek Creative Scotland's agreement/approval for this before proceeding with these communications. No such efforts were made to seek Creative Scotland's agreement, and no such agreement was given by Creative Scotland.
- Creative Scotland moved as swiftly as it could to resolve this issue. The funding was withdrawn within 4 working days of Creative Scotland becoming aware of the Artist's breach of contract.
  - The applicant complied, returning the majority of the funds. Some £8k had been legitimately spent prior to this issue arising. Creative Scotland took the decision not to seek to recoup this as it had been paid to associated freelancers for work already carried out and it was decided to recoup this would not be reasonable.

In summary, the review has considered the award and concluded that it was made in compliance with Creative Scotland policies and processes and that there was a subsequent breach of contract by the applicant which led to withdrawal of funds by Creative Scotland.

## Section 2: Lessons regarding policy, process and guidance for the future

The preceding sections of this report focused on the facts with regard to the “REIN” award and the conclusions Creative Scotland drew from this.

Whilst the assessment of Creative Scotland’s response to the “REIN” project has been extensive and is detailed above, given public and media response, Creative Scotland has proactively taken the decision to look further at the external and internal factors to understand where actions can be taken to ensure that this type of incident in relation to any award does not occur again.

The following sections indicate lessons learned and subsequent actions taken, and these are detailed below. They cover processes, controls, policies and guidance. For expediency, Creative Scotland has implemented some of the actions immediately required to further strengthen funding decisions in the short term.

In addition, there are recommendations for the medium to long term, where it will take longer to implement or further assessment is considered appropriate.

While this will focus on the Open Funding for Individuals funding mechanism through which the “REIN” award was made, some recommendations will also be valid and relevant for other funding routes and the organisation as a whole.

### 1.1 Immediate Control Measures – Open Funds for Individuals

As an immediate assurance measure while the matter was being reviewed, Creative Scotland implemented an additional control step, taking the form of a risk assessment and review by the Executive Team for the Open Fund for Individuals awards to act as an “assurance bridge” between the current process and the “future state” process.

This has been implemented and is considered prudent that this measure remains in place while any medium/longer-term changes are assessed and implemented.

This interim assurance will be retained by the Executive Team until the longer-term approach is designed and implemented, which will be as soon as practicably possible.

**Status:** Implemented

### 1.2 Broad changes to the Open Funds for Individuals

Broader risks related to Open Funds for Individuals were identified as part of this review.

### 1.2.1 Awards to individuals inherently carry more risk

Individuals by definition do not have the usual organisational support structures around them to provide governance and checks and balances on their individual activity.

In this case, it is likely that an organisational structure would have understood the significance of the change of project definition both materially and contractually.

This scope change, as contractually required, would have been communicated to Creative Scotland and the project halted to give time to Creative Scotland to consider the proposed changes. In the event it was not, then organisational governance would have led to this being understood in terms of the contractual obligations and it is highly likely that such governance would have considered referring this to major funders and/or partners for agreement in advance of notifying Creative Scotland to enable it to reconsider the new scope.

Similarly with the public call for performers, due to contractual obligations, it is unlikely this would have been approved through an organisational structure.

**Learning/Action:** Creative Scotland to communicate to applicants the implications of changing project scope.

**Status:** Implemented and Ongoing

### 1.2.3 Size of Award

The Open Funds for Individuals maximum award is £100k, which is a considerable level of risk to take with a single individual, who has complete control over and responsibility for this significant amount of public funding.

**Learning/Action:** Consider reducing the award to maximum £50,000 – [this suggested lower maximum amount has been arrived at following analysis of historical levels of demand and amounts of grant awards under the Open Funds for Individuals]

**Status:** Consideration underway

### 1.2.4 Decision timing

The Open Fund for Individuals has an 8-12 week turnaround for application decisions. The turnaround time is very challenging for Creative Scotland when the demand volume is at unprecedented levels, with the effect that Assessors have relatively little time for assessment of individual applications, and Panels have large numbers of applications to consider for funding at any one time.

Currently, additional panels are often added to the programme at short notice to manage volumes, driven largely by the need to meet Creative Scotland's own self-imposed turnaround times.

In this environment, attention to detail, risk awareness and risk management could suffer.

**Learning/Action:** Formally extend the turnaround time for application decisions by 2 weeks.

**Status:** Underway

## 1.3 Risk Awareness, Reporting and Management

### 1.3.1 Risk Assessment

On assessment of the whole project documentation for "REIN", there was a lack of adequate risk management regarding this award. The subject matter was clearly of a controversial nature and it would be reasonable to expect this risk would have been raised.

The Panel decision did not include discussion of the wider risks associated with the project with reference to Creative Scotland's risk appetite or consideration given to possible reputational risk. This could have identified the project as requiring additional mitigation by Creative Scotland, for example additional monitoring, communications or applicant engagement etc.

The panel process did not identify or flag any potential risk or a need to mitigate risks associated with the project related to the general public.

Review of the list of successful grant applicants by Creative Scotland's Communications team did not pick up the risk associated with this project.

#### **Learning:**

While project risk is assessed, the process does not appear to facilitate specific consideration of the application in terms of the level of risk Creative Scotland would be willing to bear (risk appetite) and any mitigations that might be required to bring a project within these risk appetite parameters.

The Panel process does not have a specific formal step where the risks associated with recommended outcomes and areas for escalation can be identified.

Communications review the awards list prior to publication but this review is potentially not detailed enough, as it did not identify this instance.

#### **Actions:**

- Introduce a new Panel Chair report, which will include a summary of the proposed panel outcomes and an associated risk assessment. This report to be provided to Senior Leadership Team for review of decisions and for risk awareness.

**Status:** Implemented

- Develop additional guidance for Assessors on what is acceptable risk to Creative Scotland (risk appetite) and assessing risk, and

- Provide relevant staff and panels with training overview of all changes and revised guidance.  
**Status:** Underway

### 1.3.2 Opportunities Site

The Opportunities site publication highlighted that the simple fair work/National Living Wage check being undertaken did not facilitate additional risk identification.

#### **Learning**

Opportunities site postings must be monitored for very specific elements of information as Fair Pay monitoring cannot be relied upon to also catch risks related to the project as a whole.

General Opportunities site postings could be incorrectly seen as an endorsement by Creative Scotland of particular work/projects, which it is not. This site merely facilitates announcements and recruitment in the creative sector.

#### **Actions:**

- The review of posts by the Communication Team has been extended to include a check against published Opportunities Terms and Conditions, which specify the following reasons for rejection:
  - Opportunities unrelated to Scotland's arts, screen, and creative industries, or those that do not offer high-quality developmental opportunities for the Scotland-based creative community
  - Employment opportunities that do not adhere to the National Living Wage
  - Opportunities containing language that could be deemed offensive or derogatory
  - Opportunities that could potentially harm the reputation of Creative Scotland
  - An average post takes between 5-10 minutes to assess and approve, potentially longer if further questions need to be addressed. Most clarifications revolve around ensuring Fair Work principles and adherence to the National Living Wage.

**Status:** Implemented

- Ensure Creative Scotland Communications aware of Panel outcomes and any communications implications of these.

**Status:** Implemented

- Consider whether management/monitoring of the Opportunities site should be outsourced given additional checks and resource implications of this.

**Status:** Will review once additional checks have been running for 6 months.

- Ensure site, process for posting and Terms and Conditions clearly state that opportunities posted are public postings and are not endorsed by/supported by Creative Scotland.

**Status:** Underway

- Revise, refresh and update the Terms and Conditions of use for the Opportunities site.  
**Status:** Implemented.
- Consider any further enhancements to the site that could further reduce risk associated with providing this resource.  
**Status:** not started, will implement once changes currently underway have been made.

### 1.3.3 Terminology

Staff may encounter unfamiliar terminology (e.g. non-simulated sex, sex choreography) and may assume they understand it, and that they have the same understanding as the applicant/artist, when in fact understanding may be different.

#### **Learning:**

Staff to be reminded of importance of clarifying ambiguous or unfamiliar terminology including ensuring they understand what terms mean and interrogate whether the applicant's meaning is understood and acceptable to them/Creative Scotland.

Staff should request clarity on any aspect of an application they may not understand or query on interpretation.

#### **Actions:**

Guidance for staff to be updated to reflect the identified learning

**Status:** Underway

## 1.4 Contractual Documentation

Whilst the contract and legal basis of awards is comprehensive and fit for purpose, the "REIN" project necessarily instigated a review of and highlighted some opportunities to update contractual terms and documentation.

Areas have been highlighted where Creative Scotland documentation and contractual terms and conditions could be further strengthened to improve clarity for all parties and to afford Creative Scotland both greater protection and greater flexibility.

### 1.4.1 Reputational risk

It was identified that there was no provision in the Terms and Conditions for Creative Scotland regarding reputational risk.

**Action:** Add a specific clause regarding damaging the reputation of Creative Scotland or the organisation to contract section 2.7, which deals with when a contract may be cancelled.



**Status:** Implemented

### 1.4.2 Approval of announcements

The contractual requirement regarding seeking Creative Scotland approval of announcements with regard to any project is covered in the contract. However, to remove any possible ambiguity, Creative Scotland will enhance this clause to include greater specificity and clarity as to the mechanism to demonstrate how to acquire this approval in advance of all announcements from Creative Scotland.

**Action:** Expand clause to add specific instructions on how to do this.

**Status:** Underway

### 1.4.3 Working with vulnerable groups or children

Working with vulnerable groups or children is acceptable where this has been specifically proposed in the application materials and this has been assessed as having sufficient safeguarding and duty of care measures in place as part of the application.

However, risk analysis identified projects that did not propose to work with these groups as part of the application, but contained references that might, even remotely, lead to the scope expanding in the future to include these groups.

Creative Scotland identified the need to have wording that specifically addresses this where applicable, to specifically highlight that such a change would not be acceptable under the contract. This should be a special condition, that is used where appropriate to the specific award under consideration.

**Action:** Specific special condition to be applied on a case-by-case basis as required where projects involved work with vulnerable groups or children, having full regard to Creative Scotland's obligations under the Equality Act 2010.

**Status:** Implemented

## 1.5 Conflicts of interest and maintaining fair and open competition

No conflict of interest has been identified in this particular case. However, as a by-product of review of the application assessment processes, it was noted that there was no formal provision therein to ensure that the same Assessor is prevented from carrying out an assessment of more than one application from any individual/artist over a period of time, or for an Assessor to formally be recused in the event that they had some oversight or a request for guidance in advance of an application being made. Note: artists can ask for guidance in advance of an application and this can be given in an 'oversight' context. Accordingly, it is considered that there is a benefit in ensuring that Creative Scotland's application assessment processes are updated to include specific protocols designed to guard against any conflicts of interest arising in the future.

In order to maintain the necessary impartiality and objectivity required by Creative Scotland in assessment, it is critical that any assessment staff do not

have any short or long-term involvement with an individual or project, or indeed any contact that may influence any assessment or award decision.

### **Learning and Action:**

Creative Scotland will formally clarify the following to the organisation/assessment staff:

- Assessors are unable to review and provide advice on any draft written application. **Status:** Implemented
- Assessors will not be allocated an assessment where they have been involved at any stage in the development of a project. **Status:** Being scheduled
- Assessors will not be allocated applications where they have a development role with the artists or organisations. **Status:** Being scheduled
- Where an application is linked to a previous R&D stage or follows another previously Creative Scotland funded project, the Assessor of the earlier work will be recused from all further directly related work. **Status:** Being scheduled
- Prompts and supporting guidance will be put in place for Assessors and Specialism Leads that helps to remind them of the potential for bias or reduced risk awareness to creep in unnoticed due to familiarity or other factors. **Status:** Underway
- Training will be provided to Assessors and Panels to help them apply critical thinking and notice when they might want to seek another person's views as a 'sense check'. **Status:** Not started, to be scheduled
- In addition, as part of its future Operating Model review Creative Scotland will consider how its operating structure can be modified to accommodate the important developmental work of the body, while protecting and maintaining the objectivity and fairness of its core funding activities. **Status:** Not started, will be incorporated into future operating model review
- Rules will be implemented preventing a Chair or any member of a Panel overseeing a panel where an application they have assessed is under consideration. **Status:** Implemented

## Conclusion and Next Steps

This review has been approved via the relevant Creative Scotland governance processes; the findings and associated recommendations have been agreed by the Board of Creative Scotland. The following next steps will now be taken:

- As agreed by the Chair and the CEO this review will be provided to:
  - the Cabinet Secretary for Constitution, External Affairs and Culture and
  - the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament.
- Noting that a number of recommendations have already been implemented, all of the remaining recommended actions will be reviewed and an implementation plan produced. This will include:
  - Immediate actions to be taken to amend existing processes
  - Actions to be applied to the design of future Open Access Funds.
- The Creative Scotland Senior Leadership Team will report on progress to the Board via the organisation's governance arrangements.

## Annex A – Correspondence with/appearance at the CEEAC Committee of the Scottish Parliament

Creative Scotland has provided various updates and responses regarding this award to the Constitution, Europe, External Affairs and Culture (CEEAC) Committee of the Scottish Parliament. The CEO and Chair of Creative Scotland also appeared at the CEEACC on 30<sup>th</sup> May 2024. Links to the correspondence and committee appearance are provided here for reference.

- 16<sup>th</sup> April: [Letter from CEO of Creative Scotland to CEEACC](#)
- 22<sup>nd</sup> May: [Letter from Creative Scotland CEO to CEEACC](#)
- 30<sup>th</sup> May 2024: [Appearance at the CEEACC by Creative Scotland CEO and Chair](#)
- 31<sup>st</sup> May: [Letter from Convenor of CEEACC to Chair of Creative Scotland](#)
- 17<sup>th</sup> June: [Response from Chair of Creative Scotland](#)